

1 KAREN A. OVERSTREET
Chief Bankruptcy Judge
2 United States Courthouse
700 Stewart St., Suite 6310
3 Seattle, WA 98101
206-370-5330
4

5 UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 In re)
8 KURT ERICKSON,) Chapter 7
9)
Debtor.)
10) Bankruptcy No. 05-17598
11)
12 SWIFT TOOL COMPANY, INC.,)
a Washington Corporation,) Adversary No. 05-01320
13)
14 Plaintiff.)
15 V.) **MEMORANDUM DECISION**
16 KURT ERICKSON,)
17) **NOT FOR PUBLICATION**
18 Defendant.)
19

20 This matter came before me for trial on January 22 and 23,
21 2008. After hearing the evidence and oral argument I took the
22 matter under advisement so that I could review more carefully the
23 exhibits admitted at trial. This Memorandum Decision contains my
24 findings of fact and conclusions of law for purposes of Bankruptcy
25 Rule 7052. I have jurisdiction of this matter pursuant to 28
26 U.S.C. §§ 157 and 1334 and this is a core proceeding under 28
27 U.S.C. § 157(b)(2)(I).
28

MEMORANDUM DECISION - 1

1 For the following reasons, I find that the plaintiff, Swift
2 Tool Company, Inc. ("Swift"), is entitled to judgment against the
3 defendant, Kurt Erickson ("Defendant"), in the amount of \$9,029.64
4 plus prejudgment interest from May 1, 2001, and \$500 (sanctions
5 awarded by arbitrator). I further find that these amounts are
6 nondischargeable pursuant to Bankruptcy Code § 523(a)(6).

7 I. Procedural Introduction

8 Defendant filed a chapter 7 proceeding on June 13, 2005.
9 Defendant received a discharge in the main case, which was closed
10 on September 20, 2005. Swift timely filed this nondischargeability
11 action seeking to prevent discharge of its claims against Defendant
12 based upon Sections 523(a)(6) and 523(a)(4). Swift's claims under
13 Section 523(a)(4) for embezzlement and larceny were dismissed by
14 Judge Glover in an oral ruling on summary judgment on July 27,
15 2007. It does not appear, however, that an order was ever entered
16 on his ruling.

17 On the first day of trial I dismissed Defendant's
18 counterclaims against Swift on the grounds that they were
19 compulsory counterclaims in the state court action and that
20 Defendant waived them by failing to assert them in the state court.
21 I also dismissed Defendant's harassment claim against Swift for
22 lack of any allegations in support of that claim.

23 II. Findings of Fact¹

24 Swift is an industrial cutting and tooling company doing
25 business in Washington. Swift is a family-owned business and at
26 all times relevant to this proceeding it was owned and operated by

27
28 ¹ The admitted facts in the parties' pretrial order at Docket
No. 47 are incorporated herein by this reference.

1 brothers Steve and Larry Smith. Defendant initially went to work
2 for Swift in 1998 doing indexable tool repair and grinding. He
3 subsequently left to work for Ramco, a company owned by Terry
4 Reinig, at which he also performed indexable tool repair. Prior to
5 December 1999, Swift outsourced most of its indexable tool work,
6 but later decided to diversify and keep that work "in-house" when
7 Defendant offered his services in that specialized business. It is
8 undisputed that Defendant is extremely skilled at indexable tool
9 repair.

10 As a condition to employment, Swift required Defendant to
11 enter into a Contract of Employment, Exhibit 1, which Defendant and
12 Swift signed on December 15, 1999 (the "Employment Contract").
13 Attachment A to the Employment Contract documented Swift's
14 agreement to pay Defendant an hourly wage of \$18 in addition to
15 certain commissions based upon the growth of the business. Swift
16 and Defendant understood that Swift intended to invest significant
17 funds to purchase the indexable tool repair machinery and equipment
18 necessary to bring this type of work in house to Swift. The
19 Employment Contract contained a noncompete clause which prohibited
20 Defendant from entering into business or employment in competition
21 with Swift's indexable tool business within a 50 mile radius of
22 Swift and for two years after the termination of Defendant's
23 Employment Contract. Defendant also signed a Confidentiality
24 Agreement dated December 15, 1999, which prohibited him from
25 disclosing, other than in the course of his duties with Swift,
26 information that Swift considered confidential, including without
27 limitation its customer names and pricing information. Ex. 2.

28
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1 Defendant understood the terms of both the noncompete clause and
2 the confidentiality provisions.

3 After hiring Defendant, Swift purchased the equipment and
4 machinery necessary to conduct the indexable tool business and
5 commenced advertising the availability of those services.
6 Defendant commenced work for Swift in its Everett facility on
7 January 2, 2000. Steve Smith testified that Swift's indexable tool
8 repair business grew quickly during the six months after Defendant
9 started work. Defendant was the foreman of Swift's Everett shop
10 with supervisory authority over two to three other employees.
11 Defendant had direct contact with Swift's customers whose work was
12 sent to Everett. At some point in 2000, Steve Swift began to
13 notice a decrease in the revenues being generated from Defendant's
14 work in Everett. Specifically, Mr. Swift determined that the
15 revenues were not at the level he would expect given the number of
16 hours being worked by employees in Everett. Larry Swift testified
17 that after Defendant was employed, the indexable tool repair
18 business reached a high of \$14,000 in monthly revenues and then
19 fell to a low of \$8,000 in monthly revenues.

20 Upon investigation, Swift learned that Defendant had formed
21 his own company called Indexable Tool Repair ("ITR") in July of
22 2000. Ex. 8. There is no dispute that ITR's business was
23 indexable tool repair, the same work Defendant was employed to do
24 at Swift. See, e.g., Ex. 9. In the Pretrial Order, Defendant
25 admitted that while he was an employee of Swift he was doing
26 indexable tool repair work through ITR, billing for the work
27 directly and keeping the revenue, but he denied that this work was
28 for customers of Swift. Also in the Pretrial Order, Defendant

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1 conceded that in doing ITR's work, he used machinery and supplies
2 belonging to Swift. The evidence showed that he also used the
3 services of another employee of Swift to perform ITR's work.

4 Swift presented substantial evidence that after Swift's normal
5 business hours were over, Defendant had used Swift's Everett shop
6 to engage in the tool repair business for ITR customers. Exhibit 9
7 tracks the use of Swift's business premises in the Everett facility
8 where Defendant worked. Steve Smith testified that using records
9 from the alarm company, he was able to document a minimum of 158.06
10 hours between January 1, 2001 and April 10, 2001 during which
11 Defendant was in the Everett facility after clocking off of Swift's
12 work time clock. Defendant admitted that he had taken on tool
13 repair work for ITR after hours, but that he did not conduct that
14 repair work at the Swift facility. However, he had no credible
15 explanation for the unaccounted hours shown in Exhibit 9. I find
16 that Defendant did use Swift premises to conduct some of the work
17 for ITR and that he also had another Swift employee working on ITR
18 projects during Swift working hours and on Swift's premises.

19 Defendant denies that he did any off-hour work for Swift
20 customers. I find that he did in fact work for existing customers
21 of Swift and for entities that would have become customers of Swift
22 had Defendant not diverted the work to his own company. Defendant
23 claimed that some of the customers of ITR, such as Aronson-Campbell
24 Industrial Supply, Inc. ("Aronson") and E.F. Bailey Company
25 ("Bailey"), were competitors and not customers of Swift. He
26 testified that he had formed relationships with these entities
27 prior to the time he worked at Swift. There is no evidence,
28 however, that these customers would not have done business with

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1 Swift other than Defendant's opinion. The goal of the Employment
2 Contract was that Defendant would use his contacts with these
3 businesses to bring them to Swift as customers. Instead of doing
4 that, Defendant diverted the business for his own personal benefit.

5 Through discovery, Swift obtained numerous ITR invoices to
6 various companies which document the work performed by Defendant
7 for others while he was employed by Swift. See Ex. 29, Ex. 15
8 (Aronson invoices), Ex. 16 (E.F. Bailey), Ex. 18 (Vector), Ex. 19
9 (Pederson), Ex. 20 (Genie Industries), and Ex. 22 (Barton Machine).
10 Attachment A to this Memorandum Decision lists all of the invoices
11 I find to represent work performed by Defendant (or another
12 employee of Swift at Defendant's direction) through ITR and without
13 Swift's knowledge. The invoices represent total revenue paid to
14 ITR of \$20,521.93.² All of the invoices indicate that the services
15 performed were the same as the kind of work performed by Defendant
16 for Swift. While employed at Swift, Defendant never disclosed to
17 Swift his business activities through ITR, never advised Swift of
18 his use of Swift facilities and employees to conduct ITR's
19 business, and never asked Swift for approval of these outside
20 activities.

21 Defendant conceded that beginning in September of 2000 he was
22 earning about \$2,000 per month from Barton Machine for grinding a
23 large quantity of carbine pins. See Ex. 22. He conceded that he
24 used the services of another Swift employee to complete this work.

25
26 ² Defendant claimed that he did not do the work described in
27 a few of the Aronson invoices (or that he could not remember
28 whether he did the work); however, I find his testimony was not
credible. He was the sole proprietor of ITR and controlled its
operations. He did not identify anyone else who could have done
the work.

1 He claimed, however, that Swift had rejected this job for Barton
2 Machine. Larry Swift's testimony, however, was more credible.
3 Larry Swift testified that he quoted the price of this job for
4 Barton and gave the quote to Defendant to pass on to Barton. He
5 testified that Defendant later told him that Barton chose not to
6 use Swift. I conclude that Swift would have obtained this work but
7 for Defendant's diversion of the work to himself personally.

8 After discovering Defendant's outside business activities,
9 Swift terminated Defendant's employment effective April 24, 2001.
10 After that date, Defendant continued to conduct indexable tool
11 repair through ITR. Consequently, on May 1, 2001, Swift commenced
12 a lawsuit against Defendant in King County Superior Court for
13 violation of the noncompete agreement in the Employment Contract.
14 Ex. 3. The complaint alleged breach of contract, tortious
15 interference with business relationships, misappropriation,
16 violation of the Washington Uniform Trade Secrets Act and
17 conversion. The complaint also sought an injunction preventing
18 Defendant from soliciting clients of Swift and doing business in
19 violation of the Employment Contract.

20 On May 18, 2001, the state court issued a Preliminary
21 Injunction ("Preliminary Injunction") which enjoined Defendant from
22 disclosing any confidential information concerning the business of
23 Swift and prohibited him from engaging in any business activity in
24 competition with Swift as an employee or owner within a 50 mile
25 radius of Swift. The prohibition applied to grinding,
26 manufacturing, sale or marketing of industrial tools and to the
27 solicitation of any Swift customers. Ex. 25. On June 1, 2001,
28 Defendant sold ITR's tools and equipment to Big R Manufacturing

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1 ("Big R"), a company that had been formed by Terry Reinig,
2 Defendant's prior business associate, and Defendant went to work
3 for Big R as an employee. Believing this to be in violation of the
4 Preliminary Injunction, Swift brought a motion for contempt in the
5 state court and on September 24, 2001, the state judge issued an
6 order finding Defendant in contempt for willfully violating the
7 terms of the Preliminary Injunction. The judge imposed sanctions
8 of \$500 on Defendant but did not set a deadline for the payment of
9 that amount. The judge also amended the terms of the restraining
10 order, however, to permit Defendant to work as an employee in the
11 tool grinding and repair business. Ex. 4. The order provided:

12 2.1 Kurt Erickson is enjoined from owning,
13 operating or having any status as an officer,
14 director or proprietor in any company which
15 engages in the same business activities as
16 Swift Tool did (and still does), while Erickson
17 was employed there. However, Kurt Erickson is
18 not enjoined from working as an employee for a
19 company that engages in the same business
20 activities as Swift Tool did (and still does),
21 while Erickson was employed there.

22 *Id.* The Preliminary Injunction, as amended, continued the
23 requirement that Defendant not disclose any confidential business
24 information of Swift and that he not solicit customers of Swift.

25 *Id.*

26 On February 4, 2002, the state court ordered the parties to
27 arbitrate their disputes pursuant to the terms of the Employment
28 Contract. The arbitration was scheduled for June 19, 2005.
Instead of attending the arbitration proceeding, however, Defendant
sought counsel and filed bankruptcy the day of the arbitration. It
is not clear from the evidence whether the arbitrator's award,
which is Exhibit 28, was issued before or after the Defendant's

1 bankruptcy petition was filed.³ When Defendant failed to appear at
2 the arbitration, the arbitrator required Swift to put on proof of
3 its claims and, at the conclusion of that presentation, awarded
4 damages to Swift in the amount of \$106,297.68, including principal
5 of \$43,820.80, prejudgment interest of \$16,237.83, attorneys' fees
6 of \$35,575.00, costs of \$7,374.05, and the arbitration fee of
7 \$3,290. Ex. 28.

8 In January of 2003, Defendant parted ways with Big R and went
9 to work as an employee for Jirehtek to perform the same tool repair
10 work as Defendant performed for Swift and then for Big R. Jirehtek
11 formed Total Tool for the purpose of conducting indexable tool
12 repair work. There is no evidence, however, that prior to
13 April 24, 2003, when the noncompete provision in the Employment
14 Contract expired, Defendant was an owner or operator of Big R,
15 Jirehtek, or Total Tool. There was evidence that for about a month
16 in September of 2003 Defendant was the sole operator of Total Tool
17 because of a medical problem suffered by Total Tool's principal
18 owner. Defendant ultimately acquired an 80% ownership interest in
19 Total Tool.

20 Swift entered into evidence copies of invoices submitted to
21 customers of Swift by Big R and Jirehtek/Total Tool for services
22 performed by Defendant after he was terminated by Swift. See Exs.
23 15, 16, 17, and 20.

24 **III. Conclusions of Law**

25 Based upon the foregoing findings of fact, the Court makes the
26 following conclusions of law.

27 ³ The resolution of this disputed fact is not necessary,
28 however, to my determination of the issues.

1 A. Res Judicata and Collateral Estoppel.

2 Swift argues that collateral estoppel applies to the
3 arbitrator's award of damages and that Defendant is therefore
4 estopped to challenge the amount of damages awarded by the
5 arbitrator. The resolution of this issue turns on whether an
6 arbitration award which has not been reduced to judgment pursuant
7 to the provisions of RCW 7.04A (Uniform Arbitration Act) has *res*
8 *judicata* or collateral estoppel effect as would a judgment entered
9 by the state court. I conclude that under Washington law an
10 arbitration award that is not reduced to judgment does not have *res*
11 *judicata* or collateral estoppel effect and in so concluding I adopt
12 the reasoning of *Channel v. Channel*, 61 Wash. App. 295, 810 P.2d 67
13 (1991) (arbitration award not reduced to judgment does not have
14 collateral estoppel effect). See also *Larsen v. Farmers Insur.*
15 *Co.*, 80 Wash. App. 259, 909 P.2d 935 (1996)(construing Oregon law
16 but finding it similar to Washington and following *Channel*). In so
17 holding I necessarily reject the statement in *dicta* in *Dougherty v.*
18 *Nationwide Ins. Co.*, 58 Wash.App. 843, 795 P.2d 166 (1990), that an
19 arbitration award is akin to and has the same effect as a final
20 judgment entered by a Washington state court.⁴

21
22
23
24 ⁴ At trial, Swift introduced Exhibit 27 as an itemization of
25 the damages it presented to the arbitrator. That exhibit details
26 \$99,938.13 in damages, including prejudgment interest. The
27 Arbitration Award, Exhibit 28, awards a total of \$106,297.68 in
28 damages to Swift, including principal damages of \$43,820.80. After
comparing Exhibit 27 and 28, I am not able to reconcile them and to
determine how the arbitrator calculated the principal damages
awarded.

1 B. Burden of Proof and the Elements of § 523(a)(6).

2 Section 523(a)(6) provides that "(a) A discharge under . . .
3 this title does not discharge an individual debtor from any
4 debt-...(6) for willful and malicious injury by the debtor to
5 another entity or to the property of another entity." 11 U.S.C.
6 § 523(a)(6). Swift has the burden of proving by a preponderance of
7 the evidence that Defendant's actions were "willful and malicious."
8 *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

9 The determination of a "willful and malicious" injury requires
10 a two-step analysis. *Khaligh v. Hadaegh (In re Khaligh)*, 338 B.R.
11 817, 831 (9th Cir. BAP 2006). The first step is to determine
12 whether there was a "willful" injury, which "triggers in the
13 lawyer's mind the category 'intentional torts,' as distinguished
14 from negligent or reckless torts." *Kawaauhau v. Geiger*, 523 U.S.
15 57, 61-62 (1998). A willful injury is deliberate, and it is "one
16 which, in fact, targets a particular individual for harm and in so
17 doing, injures him." *Blandino v. Bradshaw (In re Bradshaw)*, 315
18 B.R. 875, 886 (Bankr. D. Nev. 2004). Thus, the willfulness test is
19 subjective: "[Section] 523(a)(6)'s willful injury requirement is
20 met only when the debtor has a subjective motive to inflict injury
21 or when the debtor believes that injury is substantially certain to
22 result from his own conduct." *Carrillo v. Su (In re Su)*, 290 F.3d
23 1140, 1142 (9th Cir. 2002). See also *In re Jercich*, 238 F.3d 1202
24 (9th Cir. 2001)(court finds employer's willful failure to pay
25 employee wages grounds for nondischarge under § 523(a)(6)).

26 The second step of the Section 523(a)(6) inquiry is to
27 determine whether Defendant's conduct was "malicious." *Khaligh*,
28 338 B.R. at 831. To find "malicious" conduct the Court must find:

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1 (1) a wrongful act on Defendant's part; (2) done intentionally; (3)
2 which necessarily causes injury to Swift; and (4) which is done
3 without just cause and excuse. *Jett v. Sicroff (In re Sicroff)*,
4 401 F.3d 1101, 1106 (9th Cir. 2005) (as amended). It can be
5 inferred that a "willful" injury meets these requirements; in
6 particular, "evidence in the record of specific intent to injure"
7 negates just cause or excuse. *Khaligh*, 338 B.R. at 831.⁵

8 Unlawful conversion of property of another is not expressly
9 included in Section 523(a)(6), however, it is acknowledged that the
10 section also covers a willful and malicious conversion by its
11 reference to injury to an "entity" or the "property of another
12 entity." An "entity" includes a "person", which in turn includes a
13 partnership or corporation. 11 U.S.C. §§ 101(15), 101(41).
14 Although federal law determines the dischargeability of a debt,
15 state law governs the elements of a conversion of personal
16 property. Under Washington law, conversion is "the act of
17 willfully interfering with any chattel, without lawful
18 justification, whereby any person entitled thereto is deprived of
19 the possession of it." *Washington State Bank v. Medalia*
20 *Healthcare*, 96 Wn. App. 547, 554, 984 P.2d 1041 (1999).

21 C. Defendant's Conduct Prior to Termination.

22 Based upon the above authorities, Swift has the burden of
23 proving that Defendant intended to injure Swift through his
24 competing business or that the injury to Swift was certain to occur
25

26 ⁵ In two pre-*Geiger* cases, courts found an intentional breach
27 of an employment agreement and noncompete clause to give rise to
28 nondischargeable damages under Section 523(a)(6). See *In re*
Trammell, 172 B.R. 41 (Bankr. W.D. Ark. 1994); *In re Ketaner*, 149
B.R. 395 (Bankr. E.D. Va. 1992).

1 from his actions. I find that Swift has met that burden as to the
2 competing business Defendant conducted while still employed at
3 Swift. By creating his own sole proprietorship, ITR, to conduct
4 the same tool repair business Defendant was supposed to be
5 conducting as an employee of Swift, it was Defendant's intention to
6 steal or convert some of that business from Swift. Defendant's
7 Employment Contract permitted him to "engage in other gainful
8 occupation" during the term of his employment "with the written
9 consent" of Swift. Defendant knew the terms of the agreement. If
10 he believed he was *not* converting business and revenue from Swift
11 he could easily have notified Swift that he wanted to take on extra
12 work on his own time and obtained the written consent of Swift
13 before proceeding. Instead, Defendant did not inform Swift of his
14 intention to do the work, worked after hours on Swift's property to
15 do the work, and without Swift's knowledge, created his own company
16 through which he could pass the revenue.

17 Defendant took business that initially came to him as an
18 employee of Swift and diverted it for his own personal benefit.
19 Swift argues that Defendant's diversion of business opportunities
20 to himself would necessarily harm Swift and therefore Defendant
21 acted with malice. Defendant argues that as to the work done for
22 Barton, it was work that Swift had rejected. Counsel for Defendant
23 engaged in a mathematical analysis to show that the Barton work
24 would not have been of economic benefit to Swift had the work been
25 conducted by Defendant while employed by Swift. That analysis,
26 however, ignores the contrary testimony from Steve Swift. As to
27 the other work diverted by Defendant (other than Barton), Defendant
28

1 offered up no excuse other than his desire to own his own business
2 and be his own boss.

3 Defendant's diversion of business while an employee of Swift
4 satisfies the definition of conversion and it was malicious because
5 it was without just cause or excuse. According to my calculations,
6 the revenues derived by ITR as a result of Defendant's unlawful
7 conversion total \$20,521.93. Paragraph 5 of the Employment
8 Contract provides for liquidated damages in the amount of 25% of
9 any revenues derived by any entity (ITR in this case) as a result
10 of Defendant's breach of the agreement as an alternative to actual
11 damages. Although the liquidated damages provision acknowledges
12 that actual damages are difficult to calculate, I do not believe
13 they were difficult to calculate under the circumstances of this
14 case. Moreover, the undisputed testimony was that Swift's average
15 profit margin over the last 15 years has been 44 to 45% of
16 revenues. Using the contract rate of 25% of revenues would
17 therefore reward Defendant for his malicious conversion of Swift's
18 business. Accordingly, I find that Swift is entitled to 44% of
19 \$20,521.93, or a claim of \$9,029.64 for unlawful conversion.

20 Swift also contends that Defendant should have
21 nondischargeable liability for using Swift's employee discount to
22 purchase tools from a third party and for converting a pair of \$70
23 work gloves. I do not see how Swift was harmed by Defendant's use
24 of the employee discount. Furthermore, I believe Defendant's
25 testimony that workers in the Everett plant used many pairs of work
26 gloves and I find no evidence that Defendant converted a particular
27 pair.

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1 D. Defendant's Post-Termination Conduct.

2 After Defendant was terminated by Swift, he continued to
3 compete with Swift for indexable tool repair through ITR. Shortly
4 after the Preliminary Injunction was issued on May 18, 2001,
5 however, Defendant sold his equipment to Big R and became an
6 employee of that entity believing that he would not be thereafter
7 violating the noncompete provision of the Employment Contract.
8 Although he was incorrect about that, when the Preliminary
9 Injunction was amended on September 24, 2001, the state judge did
10 carve out a way for Defendant to continue to earn a living doing
11 indexable tool repair as long as he did not own or operate a
12 company in competition with Swift and as long as he did not
13 directly solicit customers of Swift.

14 There is no evidence that after September 24, 2001 and before
15 April 24, 2003 (when the noncompete expired by its own terms)
16 Defendant was anything other than an employee of Big R and then of
17 Jerehtek/Total Tool. There is no evidence that he directly
18 solicited clients of Swift during this time period. Given
19 Defendant's undisputed talent as an indexable tool repairman, it
20 would not be surprising that Swift clients who had dealt with
21 Defendant would follow him to his new employer. Based upon the
22 facts presented, I find nothing malicious about Defendant's conduct
23 after September 24, 2001 and prior to April 24, 2003. If Swift
24 believed that Defendant was flaunting the state court's order by
25 conducting business as an employee of Big R or Jerehtek/Total Tool,
26 it could have sought further relief in state court. When the state
27 court found Defendant in contempt of the initial injunction, the
28

1 judge ordered only \$500 in sanctions. I will require the Defendant
2 to pay that amount in addition to the damages identified above.

3 E. Swift's Right to Legal Fees.

4 Swift claims it is entitled to the legal fees and costs
5 awarded by the arbitrator plus fees and costs incurred after the
6 arbitrator's decision based upon paragraph 2 of the Arbitration
7 Award which states that "The plaintiff is entitled to such further
8 attorney's fees and costs as are incurred in seeking to collect
9 this arbitration award." Ex. 28. In oral argument, counsel for
10 Swift stated that fees and costs were awarded by the arbitrator
11 pursuant to RCW 4.84.185 and RCW 7.21.030. Neither statute,
12 however, is referenced in the arbitration award. There is no
13 contractual right to attorneys' fees under the Employment Contract
14 or the Confidentiality Agreement.

15 RCW 4.84.185 authorizes a state court to award attorneys' fees
16 and costs to a prevailing party where the court makes written
17 findings that the defense or claim asserted by the nonprevailing
18 party was frivolous and advanced without reasonable cause. The
19 court is to make its determination based upon a motion by the
20 prevailing party after a voluntary or involuntary order of
21 dismissal or final judgment after trial. There are no such
22 findings contained in the Arbitration Award at issue here. Ex. 28.

23 RCW 7.21.030(3) permits a state court to order a person found
24 in contempt of court to pay a party for any losses suffered by the
25 party as a result of the contempt and any costs incurred in
26 connection with the contempt, including reasonable attorneys' fees.
27 There is no finding in the Arbitration Award, however, that
28 Defendant was in contempt for failing to appear at the arbitration

MEMORANDUM DECISION - 16

1 and no indication by the arbitrator that the fees and costs awarded
2 to Swift were pursuant to RCW 7.21.030.

3 There are two separate legal fee issues in this case: whether
4 the legal fees and costs awarded in the arbitration to Swift are
5 nondischargeable as a result of my ruling in favor of Swift on its
6 Section 523(a)(6) claim, and whether Swift is entitled to recover
7 its legal fees and costs incurred in prosecuting this nondischarge
8 action. On the first issue, I conclude that Swift is not entitled
9 to a nondischargeable claim for any portion of the legal fees and
10 costs awarded it by the arbitrator. The Supreme Court has
11 confirmed that in general, a creditor in bankruptcy is entitled to
12 its legal fees and costs if there is a state law right to those
13 fees and costs, *Travelers Cas. and Sur. Co. of America v. Pacific*
14 *Gas and Elec. Co.*, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007). Having
15 found that the Arbitration Award, without a confirming judgment,
16 does not have *res judicata* effect, Swift must demonstrate some
17 other state law authority for legal fees and costs. It has no
18 contractual right to fees nor has it identified any statutory right
19 under state or federal law.

20 As to the second issue, until the Supreme Court's recent
21 decision in *Travelers, supra*, creditors could not recover
22 attorneys' fees for litigating issues particular to bankruptcy law,
23 such as nondischargeability issues. The Supreme Court in *Travelers*
24 held that postpetition attorneys' fee are recoverable to the full
25 extent of applicable non-bankruptcy law and that the Bankruptcy
26 Code does not "disallow contract-based claims for attorney's fees
27 based solely on the fact that the fees at issue were incurred
28 litigating issues of bankruptcy law." 127 S.Ct. 1204. In this

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1 case, however, there is no right to contractual attorneys' fees.
2 Swift's only right to recover fees would be pursuant to the
3 language of the Arbitration Award which is quoted above. Because I
4 conclude, however, that the Arbitration Award does not have *res*
5 *judicata* effect, it does not afford Swift a lawful right to the
6 attorneys' fees incurred in litigating nondischarge issues.

7 For these reasons, I find that Swift is not entitled to a
8 nondischargeable judgment for attorneys' fees and costs, other than
9 the costs of this litigation which might be allowable under 28
10 U.S.C. § 1920 and Bankruptcy Rule 7054(b).

11 **Conclusion**

12 Counsel for Swift may submit an order and judgment consistent
13 with this ruling. The judgement amount will be \$9,029.64 in
14 damages, plus prejudgment interest from May 1, 2001,⁶ plus \$500.
15 The order should include a dismissal of Swift's claims under
16 Bankruptcy Code § 523(a)(4) on summary judgment.

17 DATED this 13th day of February, 2008

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20 KAREN A. OVERSTREET
21 UNITED STATES BANKRUPTCY JUDGE
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26 ⁶ Arguably, Swift is entitled to prejudgment interest from
27 the date of each conversion of revenues by Defendant. For
28 simplicity, I conclude that prejudgment interest should be awarded
from the date that Swift made its demand for damages in state court
by the filing of its complaint on May 1, 2001.

Swift v. Erickson - Attachment A	
ITR Invoice No. (Misc. Customers)	Revenue
1025	21.72
1026	51.9
1027	73
1028	87.45
1029	85
1030	358.38
1031	86.88
1032	200
1033	26.94
1034	2,200
1036	115
1038	537.57
1039	685
1041	2,200
1042	644
1043	288
1045	115.47
1046	390.96
1047	2,200
1048	188.15
1050	98.83
1051	513.68
1052	110
1054	110
1055	616
1056	2,200
1057	242.45
1058	704
1059	65
1060	47.92
1062	390.96
Total	15654.26
Genie Invoices not in Ex. 29 from Ex. 20	
1003	173.25
1002	224.7
1004	194.25
1020	586.44
1009	570.15
1008	211.77
Total Genie from Ex. 20	1960.56
Aronson invoices not in Ex. 29 from Ex. 15	
1006	42.35
1005	145
1007	245

1010	193.5
1012	100
1081	172
1011	157
1017	195
1016	55
1014	223
1013	369.25
1018	216
1019	214.5
1022	98.5
1023	115.5
1024	97.5
1037	55
1035	45
1040	39.51
1044	48.5
1053	80
Total Aronson from Ex. 15	2907.11
All Vector and Pederson included in Ex. 29	
Total all invoices	20521.93
Sequential missing invoices:	
1015, 1021, 1049, 1061, 1063-1080	